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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 182

KERR'S CATERING SERVICE, a corporation,
Petitioner,

vs.

THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA; THE DIVISION OF INDUSTRIAL WELFARE OF THE STATE OF CALIFORNIA; JOHN F. HENNING, Director of the Department of Industrial Relations of the State of California; FLORENCE G. CLIFTON, Chief of the Division of Industrial Welfare of the State of California; JOHN W. QUIMBY, VIRGINIA ALLEE, DANIEL E. KOSHLAND, FRANCES LARSEN, and MAE STONEMAN, in their capacity as The Industrial Welfare Commission of the State of California,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

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PETITION FOR A WRIT OF CERTIORARI
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State of California

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the

State of California, first entered in the above-entitled case on February 19, 1962.

CITATIONS TO OPINIONS BELOW

The original opinion of the California Supreme Court is reported at 57 A.C. 347, and is not yet reported in a bound volume. That opinion is set forth in the Appendix hereto. The original opinion was modified, but the modification is not reported, and is printed in the Appendix hereto. The opinion of the California District Court of Appeal is reported in 193 A.C.A. 464, but is not reported in a bound volume, and it is printed in the Appendix also.

JURISDICTION

The judgment of the Supreme Court of California was entered on February 19, 1962. A timely petition for rehearing was filed on March 2, 1962. Rehearing was denied on March 21, 1962, but there was issued on that date a modification of opinion, which modified the previous opinion in certain respects. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

This case originally arose by means of a Complaint for Injunction and Declaratory Relief, filed by the plaintiff, petitioner herein. (C.T. 1.)[1] In that original

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[1]In this petition, the Clerk's Transcript is referred to as C.T., and the Reporter's Transcript is referred to as R.T. Page reference follows.

complaint, petitioner alleged that the administrative order here under attack violated "Section 10, Art. 1, of the Constitution of the United States of America and the Fourteenth Amendment to the Constitution of the United States of America; and that said order is illegal, unconstitutional, and without force of law insofar as it attempts to deprive plaintiff of its contractual right to deduct shortages from commissions paid to its female employees". (C.T. 4.) In the trial court, the minute order judgment held the administrative regulation "unconstitutional and void insofar as it was intended to apply, or is held by said Commission to apply, to 'the wages of an employee' in excess of the minimum wage set forth in section 4 of said Order. . . ." (C.T. 73.) The District Court of Appeal of California and the Supreme Court of California, in its original opinion, did not discuss the constitutional issues; but on petition for rehearing, the Supreme Court Opinion was modified to state that "It necessarily follows that the legislation now before us does no violence to constitutional due process or equal protection of the law". (Appendix C, page 44.)

QUESTIONS PRESENTED

1. Does an administrative regulation which deprives an employer of the right to contract, by means of collective bargaining, to deduct shortages from a negligent employee's wages over and above a minimum wage provided by state law, deprive that employer of property without due process of law?

2. Does an administrative regulation which deprives and employer of the right to contract, by means of collective bargaining, to deduct shortages from a negligent employee's wages over and above a minimum wage provided by state law, deprive that employer of equal protection of the law?

3. Is the power vested in an administrative official to issue a regulation which deprives an employer of the right to contract to deduct shortages from a negligent employee's wages, so long as said deductions do not invade the minimum wage provided by law, an unconstitutional delegation of legislative power to the executive?

STATUTE AND ADMINISTRATIVE REGULATIONS INVOLVED

The statute involved is Section 1182 of the Labor Code of the State of California. It reads as follows:

> "1182. Fixing wages, hours and standard conditions of labor: Order: Promulgation and publication. After the wage board conference and public hearing, as provided in this chapter, the commission may, upon its own motion or upon petition, fix:
>
> (a) A minimum wage to be paid to women and minors engaged in any occupation, trade, or industry in this State, which shall not be less than a wage adequate to supply the necessary costs of proper living to, and maintain the health and welfare of such women and minors.
>
> (b) The maximum hours of work consistent with the health and welfare of women and minors engaged in any occupation, trade, or industry in

this State. The hours so fixed shall not be more than the maximum now or hereafter fixed by law.

(c) The standard conditions of labor demanded by the health and welfare of the women and minors engaged in any occupation, trade, or industry in this State.

The commission may thereupon make a mandatory order to be effective on a date fixed by the commission, which date shall not be less than sixty (60) nor more than ninety (90) days from the publication thereof, specifying the minimum wage, the maximum hours, and the standard conditions of labor for women or minors in the occupation, trade, or industry in question. The hours specified shall not be more than the maximum for women or minors in California. Such order shall be published in at least one newspaper in each of the cities of Los Angeles, Sacramento, Oakland, San Jose, Fresno, San Diego, and San Francisco."

The administrative regulation involved is Section 8 of Order No. 5-57 promulgated by the Industrial Welfare Commission of the Division of Industrial Welfare of the State of California, Department of Industrial Relations. It reads as follows:

"8. No employer shall make any deduction from the wage of an employee for any cash shortage, breakage, or loss of equipment, notwithstanding any contract or arrangement to the contrary, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or wilful act, or by the culpable negligence of the employee."

STATEMENT OF THE CASE

Petitioner maintains a fleet of trucks driven by women salesgirls who purvey food and drink to employees of industrial plants at meal and break times. Pursuant to collective bargaining agreement, these girls receive a basic wage in excess of the minimum wage required by the Division of Industrial Welfare of the State of California. In addition, these girls receive a 15% commission on all sales over a quota figure of $475.00 per week. Each day each girl receives a truck full of merchandise and a small amount of cash for change purposes. At the end of the day, each girl accounts for her returned inventory and her cash. The total of the cash and the retail value of the remaining merchandise at the end of the day should equal the value of merchandise and cash entrusted to each girl at the beginning of the day. Very often there is an overage or shortage. Pursuant to collective bargaining agreement, effected with a local Teamster's Union, after a three-month break-in period, these overages and shortages are totaled on a monthly basis. If there is a net shortage for a particular route, it is subtracted from the commissions earned by the employee working that route.

The Division of Industrial Welfare of the California Department of Industrial Relations promulgated Order No. 5-52 in 1952, and Section 8 thereof read as follows:

> "8. No employer shall make any deduction from the minimum wage of an employee for any cash shortage, breakage, or loss of equipment,

notwithstanding any contract or arrangement to the contrary, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or wilful act, or by the culpable negligence of the employee."

Then in 1957 the Division of Industrial Welfare replaced Order No. 5-52 with Order No. 5-57, and Section 8 thereof read the same as Section 8 of Order No. 5-52, save that the word "minimum" was stricken from this last order.

In 1959 the Division of Industrial Welfare discovered the petitioner's method of operation as outlined above and informed petitioner the deduction was unlawful. The petitioner administratively appealed from the ruling on the ground that the shortages were caused by the culpable negligence of the driver-salesgirls. After administrative hearing, it was determined that there was no culpable negligence involved. (C.T. 36.)

Petitioner brought suit for injunction and declaratory relief against the respondents herein, alleging the existence of a dispute concerning the validity of Section 8 of Order No. 5-57. Petitioner did not dispute the administrative determination that its employees were free of culpable negligence. Petitioner did contend that its employees were guilty of simple negligence. (R.T. 3, 4.) At trial level both sides filed motions for summary judgment. (C.T. 15, 69.) The facts as outlined above were not disputed. (R.T. 3, 4.) Based upon these facts, the trial court gave summary judgment for the petitioner. Summary judgment was

by means of a Minute Order that held that the Industrial Welfare Commission of the Division of Industrial Welfare had no power to issue the administrative order, and the trial judge also declared such order to be unconstitutional, but did not specify the exact grounds of unconstitutionality. (C.T. 73, 74.)

The Division of Industrial Welfare appealed to the District Court of Appeal of the State of California, First Appellate District, Division One. In a two to one decision, the District Court of Appeal held that the Division of Industrial Welfare did not have the power to promulgate Section 8 of Order No. 5-57. Constitutional questions were not discussed. (Appendix A.) The Division of Industrial Welfare petitioned the California Supreme Court for a hearing, which was granted, and on February 19, 1962, the California Supreme Court unanimously reversed the lower courts and held the Industrial Welfare Commission had the power to promulgate Section 8. Constitutional issues were not discussed. (Appendix B.) Petitioner timely filed a petition for rehearing, which was denied on March 21, 1962, but at that time the opinion was modified to hold "that the legislation now before us does no violence to constitutional due process or equal protection of the law." (Appendix C, page 44.)

This petition for writ of certiorari then was decided upon.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE CALIFORNIA SUPREME COURT IS DIRECTLY IN CONFLICT WITH THE DECISION OF THE HIGHEST COURTS OF OTHER STATES UPON CONSTITUTIONAL ISSUES AND UNIFORMITY OF DECISION IS NEEDED TO GUIDE LEGISLATORS, ADMINISTRATORS, AND COLLECTIVE BARGAINERS IN ALL STATES.

The issue in this case is not the validity of legislation or administrative orders fixing a minimum wage. Petitioner has no quarrel with the constitutional principles which uphold minimum wage legislation. The issues here are the extent to which the state can invade the sphere above the minimum wage and the extent to which an individual can be deprived of his right to protect himself from the negligence of another.

The California Supreme Court is in direct conflict with the highest courts of Massachusetts, Wisconsin and Nebraska. In the case of *Commonwealth v. Perry* (1891), 155 Mass. 117, 28 N.E. 1126, the court had under consideration, and struck down, a statute which prohibited an employer from withholding wages from an employee where imperfections in the work product resulted from the negligence of the employee. The court stated that when a statute attempts to "compel payment under a contract of the price for good work, where only inferior work is done, a different question is presented. There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American states. A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not expressly forbidden." *Commonwealth v. Perry* (1891), 155 Mass. 117, 121, 28 N.E. 1126, 1127. This case still

stands as a vital part of the judicial framework of Massachusetts. It was cited with approval in *Com. v. Lancaster Mills* (1912), 212 Mass. 315, 98 N.E. 864, and *Atty. Gen. v. Prudential Ins. Co. of America* (1942), 310 Mass. 762, 39 N.E. (2d) 664. In Wisconsin a statute provided for no deductions from wages until a representative of the employer together with the employee determined that the defective work was the result of the negligence of the employee. In *Zarnott v. Timpken-Detroit Axle Co.* (1944), 244 Wis. 596, 13 N.W.(2d) 53, this statute was held constitutional and the court expressly mentioned that the statute did not have the vice which caused the decision in *Commonwealth v. Perry.*

The Supreme Court of Nebraska apparently agrees with the petitioner. In *Philson v. City of Omaha* (1958), 167 Neb. 360, 93 N.W. (2d) 13, at page 16, the court stated, "There is a constitutional difference in a legislative act providing that a sum no less than the going wage for like labor shall be paid and one providing for a fixed sum, irrespective of going wages or the worth of the employee. The former is generally upheld as a proper fair labor standard. While the latter is held to . . . take the private property of the taxpayer without due process of law."

Petitioner cited the Massachusetts, Wisconsin and Nebraska cases before the California Supreme Court, and its citations were in vain. Unless certiorari be granted, future legislators, administrators, members of the bar, and people in all walks of economic life will be unable to ascertain the true state of the law

covering collective bargaining agreements as affected by administrative regulations and statutory pronouncements of this type. The laws of many other states are directed toward this same problem. Despite the idea that can be gained from the Opinion of the California Supreme Court, petitioner contends that, in addition to Massachusetts, Wisconsin and Nebraska, the states of Pennsylvania, Washington and Hawaii presently restrict deductions only where the minimum wage is endangered, and none require the employer to prove more than ordinary negligence on the part of an employee to justify a deduction. The laws of Oregon parallel those of California, but no case directly in point has been found in that jurisdiction. The administrative agencies and legislatures of these states as well as others throughout the United States will anxiously await a definitive sketch of their power and its reasonable exercise which can be provided by granting certiorari. Workers, employers, and their representatives engaged in collective bargaining everywhere will be aided by a United States Supreme Court decision laying to rest the inconsistency in legal opinion. In addition, the Industrial Welfare Commission of the State of California is presently drafting amended orders, and the Attorney General of California in his Petition For Hearing, addressed to the Supreme Court of California, pointed out that he would need guidance in providing counsel to the Commission in this respect. Here again, a granting of the writ will bring certainty to beleaguered state officials and worried employers, employees, and their collective bargaining representatives.

2. THE DECISION OF THE LOWER COURT REFLECTS A MISCARRIAGE OF JUSTICE AND AN EROSION OF THE LEGAL PRINCIPLES OF DUE PROCESS OF LAW THAT REQUIRES DEFINITIVE ACTION BY THE HIGHEST COURT OF THE LAND.

At the outset, petitioner wishes it made clear it realizes that both liberty and property are not absolute concepts and that the state may deprive the individual in these spheres if the deprivation be for the common good and the restrictions be not unreasonable and unnecessary. *Seattle Title Trust Co. v. Roberge* (1928), 278 U.S. 1116. That is why petitioner consistently admits the power of the state in the field of wage and hour legislation. The principle that is being eroded by the decision of the California Supreme Court is the basic principle that even the police power of the state can be exercised only to accomplish a legitimate end in a reasonable way. *West Coast Hotel Co. v. Parrish* (1937), 300 U.S. 379. This landmark decision in the field of minimum wage law took great pains to point out that a restraint of liberty, if reasonable in relation to its subject and if adopted to combat evils menacing health, safety, morals and welfare of the people, is due process. The basic premise of the court in upholding the legislation in that case was set forth in the decision at pages 398 and 399:

> "What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very

necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. . . . The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved."

In the light of this language, the petitioner will admit that California can call for a living wage even without regard to the consideration, in terms of faithfulness and work effort, given by the employee for that wage. The pernicious effect of administrative order in the instant case is that it has no relation to a living wage and no legitimate end it is trying to reach. The minimum wage necessary to health and well being is guaranteed the employee. There is no uncertainty in the basic pay to be received. The evil device commented upon by the Supreme Court of the State of California never interferes with the neces-

sities of life. The evil device of deduction was not wrenched from an underprivileged worker in an unequal bargaining position, but was the considered concession of a strong labor union devoted to furthering the interests of the majority of its industrious and honest members. Of the evils in existence in 1937, how many are now present with the advent of minimum wage laws and powerful unions? Cannot the courts of this land take judicial notice of high standards of living, inflation, and labor unions which are in many cases as well or better organized, and as wealthy, or more so, than the employers of the employees those unions represent?

After the decision in this case it would appear that an employer now must sue his employee for negligence or discharge him. The further evil of the decision, however, is that a question remains whether the employer has a legal right to sue or a legal right to discharge, inasmuch as there would seem to be a public policy endorsing ordinary negligence when considering the actions of an employee while on the job.

Certainly due process considerations inhibit the State in fields other than those of race relations, crimes, and dealing with the Communistic threat. It is the function of the Supreme Court of the United States to help delineate the outer areas of State interference with legitimate subjects of collective bargaining in the field of labor relations. The number of employers having an intense interest in this case is large, not to mention the number of state administrative agencies and state legislators who will govern their

future actions according to any decision of the United States Supreme Court.

The fact that the only case directly in point occurred in Massachusetts in 1891 should not derogate against petitioner's request for a hearing. *Commonwealth v. Perry* (1891), 155 Mass. 117, 28 N.E. 1126. The fact that there was a dissent in that case should not be given undue weight. It is true that Justice Holmes, then in the highest Massachusetts Court, dissented in the *Perry* case. That dissent should be considered in its context of time and in the light of the progress in social development. The employee of that day did not bargain with the employer on an industry-wide basis. He did not have the economic backing of a labor organization which dwarfed many of the employers with whom it bargained. The negligence of an employee did not have the ramifications of large economic loss that are present with the ultra efficient employee run machines today. Justice Holmes was reluctant to quarrel with the direct voice of the legislature and was not dealing with an administrative extension of that legislative voice. The octopus-like arms of administrative agencies more and more are engulfing precious liberties of the individual. Petitioner realizes the California Supreme Court has put to rest the issue of whether the administrative agency has the power to issue the order in question. There still remains the question of reasonable exercise of that power which, it is submitted, can and should be examined in the light of the basically administrative source of the fetters here placed on individual free-

dom. This is true because constitutional questions often involve "conditions of time, place and circumstances". *Hartford Acc. & Indem. Co. v. N. O. Nelson Mfg. Co.* (1933), 291 U.S. 352, 361.

In the frame of reference of today's social progress, perhaps even Justice Holmes would reevaluate his dissent, especially in the light of administrative source of the power here exercised.

This case was fought on the basis of a stipulation that petitioner's employees are ordinarily negligent. (R.T. 3, 4.) The briefs on appeal make this clear. The decision of the District Court of Appeal makes this clear. Oral arguments before the lower courts enunciated this point. This was one of the main issues cited as a basis for a petition for rehearing addressed to the California Supreme Court. This stipulated set of facts overcomes any "dicta" in the letter of December 15, 1959 from the Division of Industrial Welfare to the petitioner in which it was stated "that employees working under such conditions cannot be held guilty of culpable negligence, or any negligence". (C.T. 36.) The fact is that the administrative hearings were aimed only at discovering whether the employees of the petitioner were culpably negligent, a term which means something more than ordinary negligence. (C.T. 37.) The decision of the California Supreme Court tells the petitioner, and countless others in a similar position, that he cannot collectively bargain to protect himself against the ordinary negligence of an employee. If this is not the taking of property without due process of law, where does the

power of the state, or more properly the power of administrative officials, end?

It has been judicially stated that there is an implied condition in every contract of employment, whether or not in writing, that the employee is bound to serve his employer faithfully and honestly. *Blackshear Mfg. Co. v. Umatilla Fruit Co.* (1931) (C.A. 5), 48 F.2d 174. This implied condition is now stricken in California and every other state that presently follows or will follow California, in the absence of a definitive expression by the United States Supreme Court.

Petitioner would never challenge a proper administrative finding that its employees were free of negligence because it thus would be given its every right under the law. It is the devastating effect of a state, through its administrative agency, exercising its power to deprive the petitioner of "a day in court" that leaves petitioner saddened and bewildered. If the Supreme Court of the United States does not grant a hearing, there will be many another individual in the United States similarly saddened and bewildered. What is even more surprising, petitioner in this case has been deprived of his entire theory of the case, from its first inception in court, in that the California Supreme Court seems to ignore the stipulated fact that the employees of the petitioner are ordinarily negligent. (See Concurring Opinion.)

In passing, petitioner wishes to note that while Workmen's Compensation laws may make an employer liable for the negligence of his employee, the benefits to society from such legislation are enormous

and the state provides other machinery that aids in reducing the cost to the employer.

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3. THE DECISION OF THE LOWER COURT REFLECTS A MISCARRIAGE OF JUSTICE AND AN EROSION OF THE LEGAL PRINCIPLES OF EQUAL PROTECTION OF THE LAW THAT REQUIRES DEFINITIVE ACTION BY THE HIGHEST COURT OF THE LAND.

The cases which permit an employee to recover for the negligence of an employer are legion. *A fortiori* it can be stated that a collective bargaining agreement could deal with the subject of an employer's duty to compensate an employee for property damage. In the instant case, if the employee was required to use his own money as change and the money was lost through the negligence of the employer, a collective bargaining agreement could be demanded by the union of the employee to cover such loss. Petitioner knows of no statute or regulation in California which would deprive the union of insisting on this collective bargaining contract provision. Yet the law which protects this right of the working man and his union deprives the petitioner and other employers of a similar right. To classify in a separate category the worker of forty years ago bargaining alone against his employer, the discrimination of the legislature and administrative officials might have some validity; to distinguish between the powerful unions of today and the ordinary small businessman, such as petitioner, the discrimination in the particular respect of this case is ludicrous.

The petitioner will not dwell upon the further phenomenon that in California the negligence of women and children seems sacrosanct, but it is not clear that the negligence of men is given that same distinction, inasmuch as the administrative order in question is directed only at employers of women and minors.

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4. UNLESS THE SUPREME COURT OF THE UNITED STATES SPEAKS, A SUBSTANTIAL SEGMENT OF THE AMERICAN PUBLIC IS IN DANGER OF LOSING THEIR RIGHT TO HAVE THEIR ELECTED LEGISLATORS ENACT AND REPEAL LAWS.

The Civil Code of the State of California provides as follows:

"1714. Responsibility for willful acts, negligence, etc. Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief."

"3281. Person suffering detriment may recover damages. Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."

"3543. Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

The legislature has thus created for the individual the right to be compensated for the negligence of another. Petitioner likes to think that the legislature was not merely giving each individual a right to bring a lawsuit, but was, in fact, giving endorsement to any legal means whereby one could obtain compensation for injury caused him by another. Petitioner contends that these rights insured him by these statutory enactments were taken from him by administrative action. The response immediately is evoked that since the power was given by the legislature to the Industrial Welfare Commission the argument is specious. It is at this point that petitioner feels his rights have been invaded, not only by administrative action, but also by the Opinion of the Supreme Court of California. As pointed out in the Statement of the Case, from at least 1952 to 1957, and probably before, administrative orders similar to Section 8 now under attack, prohibited deductions only from the *minimum* wage. As stated by the majority in the California District Court of Appeal, the long-standing administrative practice of the Commission indicated that it had power in this particular type of case only to protect the *minimum* wage. Then in 1957 the Industrial Welfare Commission arrogantly increased its power and struck the word "minimum" from Section 8 of Order No. 5-57. Despite these facts, the Supreme Court of California stated that a long-standing administrative construction should be adhered to and thus the power has always existed. How can this be? The prior administrative construction was that the

Industrial Welfare Commission only could make employers furnish equipment and uniforms, even if the minimum wage was not affected, because it had power under Section 1182(c) of the Labor Code to fix the standard conditions of labor. In essence, equipment and uniforms were considered to be a part of the conditions of labor. The power to fix the standard conditions of labor now is administratively extended, and judicially blessed, to invade the field of wages only. Why, then, did the Legislature enact 1182(a) and 1182(b) of the California Labor Code? Is there not here delegated power which "is not canalized within banks that keep it from overflowing"; in this case Section 1182(c) of the California Labor Code "is a roving commission to inquire into evils and upon discovery correct them". *Schechter Corp. v. U. S.* (1935), 295 U.S. 495, 557. Petitioner contends that the Legislature did attempt to delegate power by confining the power delegated to a class or group of acts properly identified and described by reference to a standard. In the field of wages, minimum wages were the subject of delegated power; in the field of hours, maximum hours; in other spheres of the employment relation, the standard conditions of labor were the subject of delegated power. In actual practice, the administrators have left these areas behind and the California Supreme Court has given judicial sanction to this usurpation of power. The decision of the California Supreme Court forever silences any criticism of the source of power. The power is there in anything touching standard conditions of labor, and

standard conditions of labor encompass the entire field of both wages and hours despite the attempted restrictions of Sections 1182(a) and 1182(b) of the California Labor Code. The only question for future litigants is whether the power is reasonably exercised. Petitioner cannot believe that this unlimited "roving commission" is the power the Legislature meant to delegate or the power constitutional guarantees permit to be delegated.

CONCLUSION.

Because of the uncertain state of the law in the areas encompassing the legal questions here involved, a writ of certiorari should be granted in accordance with the prayer of this petition.

Dated, San Leandro, California,
June 14, 1962.

Respectfully submitted,

ROBERT E. HANNON,
Attorney for Petitioner.

ARTHUR L. PRETZER,
Of Counsel.

(Appendices A, B and C Follow)

Appendix A

(193 A.C.A. 464)

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 19,710

KERR'S CATERING SERVICE, a corporation,
Plaintiff and Respondent,

vs.

THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA; THE DIVISION OF INDUSTRIAL WELFARE OF THE STATE OF CALIFORNIA; JOHN F. HENNING, Director of the Department of Industrial Relations of the State of California; FLORENCE G. CLIFTON, Chief of the Division of Industrial Welfare of the State of California; JOHN W. QUIMBY, VIRGINIA ALLEE, DANIEL E. KOSHLAND, FRANCES LARSEN, and MAE STONEMAN, in their capacity as The Industrial Welfare Commission of the State of California,
Defendants and Appellants.

MAJORITY OPINION

Defendants appeal from summary judgment in favor of plaintiff holding a certain order of defend-

ant Industrial Welfare Commission unconstitutional and void.[1]

Questions Presented

1. Is the deduction of shortages from the "commissions" of a woman employee a deduction from "wages"?

2. Does the commission have authority to prohibit plaintiff, under a collective bargaining agreement, from deducting cash shortages from women employees' commissions, even though the minimum wage is not disturbed?

Record

Plaintiff is engaged in the industrial catering business. Plaintiff brought this action for injunction and declaratory relief to test the validity of section 8 of Industrial Welfare Commission Order No. 5-57 (8 Cal. Admin. Code § 11380). Defendants filed an answer and then a motion for summary judgment. Plaintiff filed a cross-motion for summary judgment. The trial court gave judgment in favor of plaintiff and denied defendants' motion.

There is no dispute on the facts. Plaintiff maintains a fleet of trucks which are sent out daily on regular routes to various business and industrial establishments in the East Bay. The employees of the plants visited purchase coffee, doughnuts, sandwiches, etc., from the trucks. Plaintiff employs a number of women as driver-salesgirls on these trucks. Pursuant

[1] An amici curiae brief was filed in behalf of Air Transport Association of America, supporting the judgment.

to a collective bargaining agreement, these girls receive a base pay or wage which exceeds the minimum wage required by the Division of Industrial Welfare (¶ 4, order 5-57). In addition the girls receive a 15 per cent commission on all sales made on a regular route over a quota figure of $475 per week. After such employee has been with the company for three months overages and shortages are totaled monthly, and if there is a net shortage for a particular route, it is substracted from the commissions earned by the employee working that route. The shortages are computed as follows: Before leaving on her route the driver-salesgirl is required to inventory the goods on her truck. She receives a small amount of cash for change purposes. At the completion of the day's work she again is required to inventory her truck, and turn in her cash. The total of the cash and the retail value of the merchandise remaining at the end of the day should, in theory, equal the value at the beginning of the day. In practice it does not, and the extent of difference is the amount of the overage or shortage.

An administrative determination was made that the shortages here involved are not caused by a dishonest or wilful act or by the culpable negligence of the employee. This determination is not attacked.

Plaintiff was informed by the division that this method of operation was unlawful under section 8 hereafter set forth.

1. *Deduction is from "Wages."*

Section 8 of order 5-57 provides: "Cash Shortage and Breakage. No employer shall make any deduction from the wage of an employee for any cash shortage, breakage, or loss of equipment, notwithstanding any contract or arrangement to the contrary, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or wilful act, or by the culpable negligence of the employee."

Amici curiae contend that as the deductions for shortages are only from the "commissions," if any, earned by the employee, and not from the basic wage, section 8 is not violated. Plaintiff makes no such contention. While order 5-57 gives no definition of "wages," section 200, subdivision (a) of the Labor Code does. "'Wages' includes *all amounts* for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (Emphasis added.) This section completely answers the contention adversely. See also *People v. Alves* (1957), 155 Cal.App.2d Supp. 870 [320 P.2d 623], holding that payments to a health and welfare fund required by a collective bargaining agreement constitute "wages."

2. *Power of commission.*

Section 1182 of the Labor Code provides: "After the wage board conference and public hearing, as provided in this chapter, the commission may, upon its own motion or upon petition, fix:

"(a) A minimum wage to be paid to women and minors engaged in any occupation, trade, or industry in this State, which shall not be less than a wage adequate to supply the necessary costs of proper living to, and maintain the health and welfare of such women and minors.

"(b) The maximum hours of work consistent with the health and welfare of women and minors engaged in any occupation, trade, or industry in this State. The hours so fixed shall not be more than the maximum now or hereafter fixed by law.

"(c) The standard conditions of labor demanded by the health and welfare of the women and minors engaged in any occupation, trade, or industry in this State. . . ."

Subdivision (a) grants the commission the power to deal solely with minimum wages for women and minors. Subdivision (b) grants it power to deal solely with maximum hours of work for women and minors. All parties agree that neither of these subdivisions grants the commission power to enact section 8. The commission contends that subdivision (c) grants it that power in that the regulation of cash shortages is a "condition of labor" demanded by the welfare of women employees. Plaintiff contends that said subdivision does not grant that power, and, if it does, the subdivision is unconstitutional as violating plaintiff's liberty of contract.

Plaintiff contends that while the statute gives the commission general power to fix "[t]he standard con-

ditions of labor" and that while wages and hours are in a sense "conditions of labor" the general grant of power in subdivision (c) is limited by subdivisions (a) and (b) in that the commission cannot fix the amount of wages to be paid, but only the minimum wage, nor fix the hours to be worked, but only the maximum hours. But, says the commission, it is free to make regulations relating to "conditions of labor demanded by the . . . welfare of the women . . ." even though such regulations affect wages; and that section 8 deals with "conditions of labor."

The commission points out that in determining whether section 8 is within the power of the commission to adopt, two things must be noted, first, Labor Code, section 1200, specifically provides that the commission's regulations are presumed to be reasonable and lawful, and secondly, "Administrative rules and regulations are presumed to be reasonable in the absence of proof to the contrary and courts will not substitute their judgment for that of the administrative agency unless it is clearly shown that the regulation is so unreasonable as to be arbitrary or capricious, *or in excess of the authority vested in the agency.* [Citations.]" (*Bess v. Park*, 144 Cal.App.2d 798, 804 [301 P.2d 978]; emphasis added.) Here, in spite of the presumption that the commission's act is lawful, it appears that the commission is acting in excess of the authority vested in it by subdivision (c). We are not required to consider the question of the reasonableness of the regulation imposed by section 8, unless and until we determine whether or not the commission had the power to enact it.

The problem reduces itself to the question, are deductions of shortages from wages a mere matter of financial consideration, or are they ones affecting "conditions of labor demanded by the health and welfare of" women employees?[2] Conceivably, anything that increases or reduces the overall compensation of an employee could be considered a condition of labor demanded by the welfare of the employee. Thus, under such a theory a scale of wages higher than the minimum referred to in subdivision (a) could be required under the welfare clause of subdivision (c). However, it is conceded that by limiting in subdivision (a) the commission's powers to the fixing of minimum wages, the Legislature was restricting the commission's power to otherwise deal with wages. This restriction, however, would not apply to a matter which although indirectly affecting wages was actually a condition of labor required by the welfare of the employees. Protective clothing is an example of this. A regulation requiring the employer instead of the employee to pay for the clothing, obviously affects the employee's wages, yet primarily the regulation is dealing with a condition of labor required by the employee's health and welfare, namely, the assurance that the employee's protection will not be dependent upon his failing to provide such protective clothing when and as needed because his income would be reduced by the amount of the clothing's cost.

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[2]It is conceded that the health of the women employees is not involved. Hereafter only the "welfare" portion of section 8 will be referred to.

The commission claims that the main reason that requiring the employer to absorb all cash shortages is a matter of a condition of labor demanded by the welfare of the women, is that the regulation "protects working women from exploitation by the unscrupulous," that "although the employer insists that she is allowed to take such time as necessary, there is doubtless considerable pressure to leave on time. Accordingly there is considerable temptation to accept as correct what the employer has stated has been placed on the truck,"—then at the conclusion of the day, says the commission, "No doubt the desire to leave and get home tends to make the girls rely on the office to count the money correctly. Thus at both ends the employer is in a position to fudge the accounts by padding the inventory in the morning and by losing money or inventory in the evening."

It must be remembered that we are dealing here not with a constitutional grant of authority to impose a requirement of this kind, but with the question of whether the Legislature has provided statutory authority for the order. The Legislature has not provided the commission with power to regulate *all* conditions of labor but only those which affect the welfare of the women employees. The situations mentioned by the commission as calling for regulations to protect the welfare of the women employees are not shown to exist.[3]

[3]The commission states that the record in this case would not support an inference that plaintiff is cheating its employees.

If (although there is no evidence thereof) there is a possibility, as claimed, that the employer does not give the employee sufficient time to make the inventory either at morning or night, a regulation requiring that sufficient time for this purpose be given employees would be a condition of labor for the employee's welfare. It hardly can be said that a drastic regulation such as set forth in section 8 could be justified merely because some employee is more anxious to get home early than to exercise her right to check her inventory. It would seem that other than as a method of increasing the employee's income, the regulation is not demanded for the welfare of the women employees. It must be remembered that from the time the employee leaves the employer's premises until she returns, the employer's money and goods are entirely in her hands. Any shortages are not due in any way to any action by the employer but solely to her actions in not guarding her stock. Surely, the welfare of an employee does not demand that she be rewarded for carelessness.

Deductions for cash shortages are entirely different from deductions for breakage. Breakage can be caused by many causes beyond the control of the employee. Because of this fact, if the employee were required to pay for breakage, there would be interminable conflicts between the employer and the employee over the cause, thereby bringing about what the commission suggests without any basis is the situation with reference to shortage deductions, namely, "exploitation [of the women] by the unscrupulous."

Moreover, generally speaking, the employer has some control over breakages in that they occur upon his premises. With cash shortages, he has no such control as the employee has full control over her "wagon shop."

In *California Drive-In Restaurant Assn. v. Clark* (1943), 22 Cal.2d 287 [140 P.2d 657, 147 A.L.R. 1028], the court upheld a regulation prohibiting tips received by women and minor employees from being included in the minimum wage fixed by the commission on the ground that to permit the employer to retain tips received by the employees below the minimum wage "would be a subterfuge for him to receive all the tips and pay the minimum wage. The end result would be counting the tips as a part of the legal wage." (P. 293.) The basis of the decision was that the regulation was proper in order to make the commission's rules as to minimum wage effective. Obviously there is no similar situation here. The main question in that case was whether the Statutes of 1929, page 1971, requiring an employer who intends to keep tips or gratuities received by his employees to post a notice to that effect, repealed the commission's regulation above mentioned. It is significant that in holding that it did not; the court said that the prohibition against the employer's retaining any portion of the tips "should be strictly limited, and said action would not be violated in instances where the employer retained the entire amount of all tips received *above* the minimum wage, *or deducted the tips from the amount of any wages he agreed to pay in excess of the specified minimum.*" (P. 293; last emphasis added.)

We are dealing here, not with what power the Legislature could have conferred on the commission, but with what power it did confer.

The commission states that subdivisions (a) and (b) are limitations on the power granted in (c), and admits that the power granted in (c) does not include the right to *fix* wages or hours and yet the commission seems to argue that even if section 8 deals with wages, subdivision (c) gives the commission the power to increase the employee's wages by merely stating that such increase is a condition of labor demanded by the welfare of the women.

To hold that such power is given by subdivision (c) is to completely ignore the effect of the obvious power limitation in subdivision (a).

In determining whether the Legislature in the enactment of section 1182 intended to grant the commission under subdivision (c) the right to deal with wages additionally to establishing a minimum wage under (a), section 224, Labor Code, becomes significant. While the section is dealing with a different situation than is section 1182, the intent of the Legislature to leave matters concerning wages (other than the minimum wage) to collective bargaining or to agreement between employer and employee is well shown. Section 224 states that section 221 (prohibiting an employer from receiving a rebate from the employees), section 222 (prohibiting withholding an employee's wages with intent to defraud), and section 223 (prohibiting secret payment of wages lower than designated scale), shall not apply to deductions to cover insurance pre-

miums, hospital or medical dues or *other deductions* when authorized in writing by the employee or by collective bargaining. Thus, it appears that the Legislature in dealing with the matter of wages desired to protect the principle of employee and collective bargaining, except in specified situations. To interpret section 1182, subdivision (c) as the commission did here, would be to disregard the intent of the Legislature.

The fact that there are other states which have adopted measures requiring cash shortages to be absorbed by the employer is not important here, for the reason that we are not dealing with the power of the Legislature to either make such a regulation or grant power to the commission to make it. As before stated, we are only concerned with the question of whether or not such power was granted to the commission.

Thus it is a case of interpreting our statutes. On the question of whether deductions for cash shortages are a part of conditions of labor demanded by the welfare of the women employees, the nearest approach to the situation here is that in *Southern Pac. Co. v. Joint Council Dining Car Employees,* (9th Cir.) 165 F.2d 26, cert. den. 333 U.S. 838 [68 S.Ct. 608, 92 L.Ed. 1122]. There the union brought suit against the railroad company claiming that the minimum wage prescribed in the Fair Labor Standards Act was not being paid. It was agreed that if the free meals supplied to dining car employees were to be considered as a part of the wage, then the minimum was being paid; otherwise not. One of the union's contentions was that

the free meals were a "working condition" rather than a part of the wage. As to this contention the court said, "If the free meals (part of the 'price' paid for his services) is a 'working condition,' though given when not working, then we have the absurdity that the cash paid is also a working condition. In another sense, the payment of the price to secure a man's working is a *condition* precedent to such working, but it is not a 'working condition' in the ensuing employment." (P. 29; see *California Emp. Com. v. Black-Foxe Inst.*, 43 Cal.App.2d Supp. 868 [110 P.2d 729].)

It is unrealistic to compare deductions for shortages where the entire control of the merchandise and cash is in the hands of the employee, with secret deductions or "kickbacks," nor is there any basis for stating that because of such deductions there is danger of the employer through manipulation passing on to the employee expenses which should normally be borne by management. At least, no such danger is shown in this case. If such danger exists it is a matter of which the Legislature should take cognizance and grant the commission authority to regulate against. It is not for the courts to assume the existence of such danger in order to disregard the Legislature's obvious intent to leave the regulation of wages, above the minimum wage, to employer-employee bargaining, nor should the courts make such assumption in order to hold that what is obviously a financial matter is a "working condition."

The commission contends further that for a long time it has construed subdivision (c) as giving it

general powers in many matters dealing with conditions of labor, that these interpretations have never before been challenged, and that such administrative construction should be followed "if not clearly erroneous." (*Adoption of Parker*, 31 Cal.2d 608, 615 [191 P.2d 420]; *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10].) Applying this rule, however, supports plaintiff's contention. While it is true that the commission for a long time has applied subdivision (c) to many matters which it considered conditions of labor demanded by welfare of women, it was not until 1957 that the commission determined that it had the power to require cash shortages in the "Public Housekeeping Industry" (the designation applied by the commission to the type of business conducted by plaintiff) to be paid by the employer. In fact, for a number of years its regulations left the question of responsibility for cash shortages to collective or employee bargaining, subject only to the requirement that no deduction from minimum wages could be made. Thus, the commission, up to 1957, interpreted section 1182, subdivision (c), as limiting its power to deal with wages to the requirements of subdivision (a). The fact that the commission applied subdivision (c) broadly to other matters but limitedly to cash shortages indicates that the commission administratively interpreted subdivision (c) as being in this respect limited by subdivision (a). As we said in *Yosemite Park & Curry Co. v. Department of Motor Vehicles* (1960), 177 Cal.App.2d 448, 454 [2 Cal. Rptr. 431], concerning the administrative practice

there, "This long standing practice of the department charged with the administration of these laws is persuasive as to their meaning. [Citations.]"

Inasmuch as we have determined that section 1182 does not grant the commission the power to adopt section 8, it is unnecessary to consider the contentions as to whether such a regulation, if the legislative authority to adopt it existed, would be reasonable or constitutional.

The judgment is affirmed.

Bray, P. J.

Duniway, J., concurred.

DISSENTING OPINION

TOBRINER, J.—I dissent.

The question we ponder here is finely balanced; the resolution is difficult. The majority opinion is pristine and persuasive; if one were to accept its major premise it is compelling.

And yet I fear its implications. We invalidate, here, not a regulation which restricts individual freedom as against governmental encroachment, but we strike down an *economic* regulation of a government agency which has been set up to protect employees who are peculiarly weak in collective bargaining—women and minors. Because of this basic purpose of the legislation I am loath to interpret the grant of powers to the commission in a spirit of narrowness. If we invalidate the regulation involved here, we necessarily throw doubt upon many other regulations of the com-

mission which protect the health and welfare of these employees. I would insist that the regulation stand unless its opponents show that it is surely outside the scope of the agency's province and clearly arbitrary. I do not believe the opponents have sustained this burden.

The commission undoubtedly believed, with reason, that the method, the technique, of *deduction* from the woman's or the minor's wage in itself constituted a dangerous device. The history of this subtle means of reducing a wage has been an unsavory one. In the past employers have utilized secret deductions or "kick-backs" to make it appear that the employer paid the wage provided by the collective bargaining contract or by a statute, although, in fact, he paid less. The nefarious use of this tactic during the days of the depression led to the enactment of Labor Code, sections 221-223. (Stats. 1937, p. 200.) As the Supreme Court said in the case of *Sublett v. Henry's etc. Lunch* (1942), 21 Cal.2d 273 [131 P.2d 369], "These sections . . . are declarative of an underlying policy in the law which is opposed to fraud and deceit." (P. 274.)

The device of the wage deduction has also often been used to shift to the worker the payment of improper and unconscionable amounts. Thus *Shalz v. Union School Dist.* (1943), 58 Cal.App.2d 599 [137 P.2d 762], involved deductions by the employer from stipulated wages for payment of exorbitant amounts for lodging and transportation. These deductions were in reality nothing more than devices to reduce the wage scale. Because of the danger of fraudulent use of deductions

and because employers through manipulating them could pass on to workers expenses which should be normally borne by management, our statutes have prohibited such withholding except in specified situations, not only for women and minors but for all workers. (See Lab. Code, §§ 222, 222.5, 223, 224.)

The policy underlying this legislation rests in part upon the importance of protecting the worker in the realization of his expected pay. The worker relies upon such anticipated compensation whether it be computed upon the basis of a set minimum, a piece rate, or a commission. To riddle that compensation with unanticipated or undetermined deductions is to disrupt the normal expectancy of standard compensation and to impose special hardship upon the employee. It is not too much to say that the policy of the State of California does not favor deductions or withholdings from payment by employers except as specifically authorized by statute.

The devious device of the deduction has been used here to reduce the woman's earnings for causes beyond her fault or control. The commission prohibits the deduction for shortage, breakage, or loss of equipment unless such loss is caused "by a dishonest or wilful act, or by the culpable negligence of the employee." While the majority state "the welfare of an employee does not demand that she be rewarded for carelessness" and that "shortages are . . . due . . . solely to her actions" [1](p.), the loss in the in-

[1] *Ante*, p. 469.

volved situation may be due to theft, breakage, or breakdown of equipment quite beyond the employee's control. The purpose of the regulation, then, is to protect the expected and standard compensation of the employee against the deduction which inures from matters beyond his own fault or control. The legality of the regulation rests upon the proposition that the standard conditions of labor demanded by the health and welfare of the employee are destroyed if the standards of computation can be corroded by arbitrary deductions not related to the employee's performance.

If the commission does not have the power to forbid the device of the deduction here, I find it hard to understand how it has the power to do so in other instances. The commission has exercised such power in other respects; thus sections 9(a) to 9(e) of order number 5-57 forbid deductions for required uniforms, deductions for tools or equipment and deductions for protective garments. The majority suggests that deductions for protective garments may be differently treated than the instant deduction, stating that "by limiting in subdivision (a) the commission's powers to the fixing of minimum wages, the Legislature was restricting the commission's power to otherwise deal with wages. This restriction, however, would not apply to a matter which although indirectly affecting wages was actually a condition of labor required by the welfare of the employee. Protective clothing is an example of this." [2](P. ——.) Whether the subject matter of the regulation operates to protect the compensa-

[2] *Ante*, p. 468.

tion of the employee or the physical standards of the employee does not determine its validity: the test must be the adverse effect of the practice upon the welfare of the employee. The vice of the technique of deduction, as applied here, may be as destructive of the welfare of the employee as the use of deductions for protective clothing.

The attempted distinction of the majority opinion as to losses from breakages must, I believe, likewise fail. The opinion apparently recognizes the indefensibility of an employer's forcing upon an employee the assumption of a loss for a breakage that occurs upon the employer's premises. Thus the opinion states that "generally speaking, the employer has some control over breakages in that they occur upon his premises." [1] (——.) If this means that the commission could properly issue an order of the instant type if it were applicable to work performed upon the employer's premises, I must submit that the distinction is unrealistic. Why should the commission be empowered to forbid the deduction because of differences in the employer's control? The arbitrary nature of the deduction lies in the fact that it is imposed despite the employee's lack of fault. The employee might be equally faultless if the breakage occurs off the employer's premises as well as upon them.

The majority's basic reasoning seems to be that a prohibition of a deduction from earnings through commissions necessarily protects the total wage; that

[1] *Ante*, p. 470.

the only power of the commission derives from subdivision [Lab. Code, § 1182] (a) which pertains to *minimum* wages, and that the protection of the total wage thus lies beyond the commission's power. The reasoning overlooks the essence of the regulation: the prohibition of an obnoxious practice destructive of the employee's general welfare. The compensation aspect of the regulation does not infect it with an exclusive monetary purpose and negate all other objectives. For instance, to concoct an extreme hypothetical illustration in order to test the principle, the commission might forbid the deduction of penalties from total wages for joining a union or engaging in collective bargaining activities. The power of the commission to forbid the employer from interfering with the employee's rights would thus assume the aspect of protecting the wage of the employee, a wage greater than the minimum. Yet such an effect of the regulation would not necessarily invalidate it if its purpose were the protection of the standard conditions of labor demanded by the health and welfare of the employee.

To uphold this regulation is not to grant to the commission the power, as amicus curiae suggests, to regulate "well-nigh every financial and economic arrangement between employer and employee. . . ." The commission may validly prohibit only practices which destroy standard conditions of labor demanded by the health and welfare of the women and minors. The test must be whether or not the prohibited practice, in view of its past effects upon employees, and in light

of its anticipated future consequences, will adversely affect standard conditions of labor demanded by their health and welfare. Does not a court arrogate to itself a peculiar omniscience in declaring the commission not only wrong in its conclusion as to these matters but powerless even to reach it? Economic history discloses the danger of the arbitrary deduction from the wage; employer deductions for causes as to which the employee is faultless disrupt satisfactory employer-employee relations; the state's policy itself discourages such deductions. Such considerations as these support the commission's regulation, and I am unable to find any reason why the regulation, accordingly, does not fall within the commission's responsibility to protect the standard conditions of labor demanded by the health and welfare of the employee.

In summary the effect of the ruling is to reduce to narrow limits the authority of the commission under subdivision (*c*). The majority say that if a regulation is decreed by the court to affect wages only, the regulation fails because the commission is confined to the establishment of minimum wages under subdivision (*a*). But, in my judgment, the commission properly found that the arbitrary deduction for losses caused by thefts beyond the employee's control adversely affected her welfare. Its purpose extended beyond the matter of wages alone; it prohibited a questionable practice which the employer used here for an obnoxious objective. I believe that, in declaring the commission's findings to be without warrant, the majority overlooks the realities of labor-management relations

and the deleterious effect of the prohibited practice. The end result is the partial nullification of the legislative intent to protect women and minors against the destruction of the standards demanded by their health and welfare.

For the reasons above stated I believe the regulation reasonable as well as within the power of the commission.

I would reverse the judgment.

Filed June 28, 1961,
Lawrence R. Elkington, Clerk.

Appendix B

In the Supreme Court of the State of California

In Bank

S. F. 20,617

KERR'S CATERING SERVICE,
Plaintiff and Respondent,
vs.
THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA, et al.,
Defendants and Appellants.

OPINION

Defendants appeal from a summary judgment in favor of plaintiff Kerr Catering Service holding a certain order of defendant Industrial Welfare Commission unconstitutional and void.

Plaintiff is in the industrial catering business. It maintains a fleet of trucks which are sent out on regular routes to various business and industrial establishments. Each truck is driven by a woman employee who also sells sandwiches, coffee and other food items which are carried on the truck. Plaintiff's employees are organized into a union and pursuant to a collec-

tive bargaining agreement, they receive a wage which equals or exceeds the minimum specified in the applicable order of the Industrial Welfare Commission. After completing a probationary period of three months, the driver-salesgirls receive a 15 per cent commission on all sales in excess of $475 a week.

This percentage commission, payable monthly, is subject to reduction in the amount of any "cash shortage" attributable to the salesgirl during the month. The shortages are computed in the following manner: The driver-salesgirl is required to inventory the goods on her truck prior to going out each day, receives a small amount of cash to make change, and upon returning at the end of the working day she counts the cash and again takes an inventory of the goods. In theory, the total of the closing inventory plus cash sales should equal the initial morning inventory, but in practice this seldom occurs. The extent of the difference is the amount of overage or shortage for that day. The net shortage for the month is deducted from the employee's commission, but not from her base wage in the event the net shortage exceeds her commissions.

Plaintiff was notified by the Division of Industrial Welfare that this deduction for cash shortages was unlawful under section 8 of Order No. 5-57 of the Industrial Welfare Commission (8 Cal. Admin. Code, § 11380), which provides: "No employer shall make any deduction from the wage of an employee for any cash shortage, breakage, or loss of equipment, notwithstanding any contract or arrangement to the contrary, unless it can be shown that the shortage, breakage, or

loss is caused by a dishonest or wilful act, or by the culpable negligence of the employee."

Following receipt of the aforesaid notice, plaintiff instituted this action for an injunction and declaratory relief, alleging that section 8 of the foregoing order was in excess of the statutory authority of the commission and unconstitutional. The Industrial Welfare Commission of the Department of Industrial Relations filed an answer and moved for summary judgment. Plaintiff filed a cross-motion for summary judgment. The trial court, acting on such motion, rendered judgment in favor of plaintiff.

Under the statutory definition found in Labor Code section 200, "'Wages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, *commission basis*, or other method of calculation." (Emphasis added.) Plaintiff does not urge, therefore, that section 8 of the instant order is inapplicable because the deductions are made from commissions as opposed to basic pay.

The parties agree that if statutory authority for section 8 of the commission's order exists, it is to be found in Labor Code section 1182 which grants to the Industrial Welfare Commission the power to issue orders which "fix:

> "(a) A minimum wage to be paid to women and minors engaged in any occupation, trade, or industry in the State, which shall not be less than a wage adequate to supply the necessary costs of proper living to, and maintain the health and welfare of, such women and minors.

"(b) The maximum hours of work consistent with the health and welfare of women and minors engaged in any occupation, trade, or industry in this State. The hours so fixed shall not be more than the maximum now or hereafter fixed by law.

"(c) The standard conditions of labor demanded by the health and welfare of the women and minors, engaged in any occupation, trade, or industry in this State. . . ."

The narrow question presented, then, is whether the commission has power to prohibit deductions for cash shortages from employees' commission even though the affected employees are earning more than the minimum wage. The question is composed of two parts: 1) Do subdivisions (a) and (b) of section 1182 of the Labor Code limit the commission's power to fix, under subdivision (c), only those "standard conditions of labor" which do not affect either the wage or hours? 2) If the commission's power under subsection (c) is not so limited, can such deductions for cash shortages not due to the employee's dishonest or wilful act or culpable negligence be characterized as standard conditions of labor?

Plaintiff construes this statute as giving the commission three separate and distinct powers which are mutually exclusive. Thus, according to this view, after fixing the minimum wage, the commission had no power to make any further provision whatsoever affecting the wage. Accordingly, since the plaintiff's employees were admittedly receiving more than the minimum wage, the commission had no power to pro-

hibit deductions which did not reduce the net wage below the minimum. That, by similar reasoning, the commission's power over the hours of work is limited to fixing the maximum hours, and anything further relating to hours would be beyond the power of the commission. This construction would confine subsection (c) to empowering the commission to regulate nothing which incidentally affects minimum wages or maximum hours.

Defendants, to the contrary, urge that subdivision (c) of section 1182 gives the commission general power to fix "the standard conditions of labor," except insofar as this general grant of power is expressly limited by subdivisions (a) and (b). That while wages and hours are certainly "conditions of labor," the commission cannot fix *the* wage paid or *the* hours worked because subdivisions (a) and (b) limit the commission's power in those respects to fixing the *minimum* wage and the *maximum* hours. The commission is free, defendants continue, to make regulations which relate to wages and hours but which do not attempt to prescribe them.

One such provision, first introduced into the commission's orders in 1947, and not challenged since, requires that employers pay for all necessary protective garments. This provision has never been limited to employees receiving the minimum wage. Although the protection of the health and safety of women and minors is the obvious purpose of this provision, it also affects wages, as the employer may not deduct the cost of protective garments from the employee's compen-

sation. Under plaintiff's construction of section 1182, and the one adopted by the trial court, this provision concerning protective garments would come under question because of its effect on wages. Other provisions of existing orders of the commission which would also be subject to question under this construction are the prohibition on deductions for uniforms, for tools and equipment, the requirement of time and one-half the regular rate of pay for overtime, one dollar per day extra for split shift workers, and two dollars for reporting for work if work is not available. All of these provisions have in common the fact that they "affect the wage," but apply regardless of whether or not the employee is making the minimum wage, and are for the purpose of prohibiting or discouraging working conditions prejudicial to the welfare of women and minor employees.

Defendants state that the commission has long exercised such general powers which have not heretofore been challenged in any court action. That its position has been sustained by the Attorney General, who in 1944 advised the commission that it had the power to prohibit employers from requiring women and minors to furnish their own equipment and uniforms regardless of whether the employees were earning more than the minimum wage (3 Ops. Cal. Atty. Gen. 353), and this interpretation was reaffirmed recently with regard to sections 8 and 9 of this series of orders (33 Ops. Cal. Atty. Gen. 27 (1959)). Defendants earnestly urge that such a long-standing and established administrative construction of their powers should be accorded considerable weight, and adhered

to "if not clearly erroneous." (*Adoption of Parker*, 31 Cal.2d 608, 615; *Los Angeles v. Superior Court*, 17 Cal.2d 707, 712.) We are persuaded that the construction placed upon section 1182 of the Labor Code by defendants is the reasonable and proper one, *i.e.*, that the authority conferred upon the commission by subdivision (c) is not limited to the issuance of orders which do not affect wages or hours.

We turn now to the second part of the question: may deductions for cash shortages not due to an employee's dishonest or wilful act or culpable negligence be characterized as affecting "standard conditions of labor?"

Wages of workers in California have long been accorded a special status generally beyond the reach of claims by creditors including those of an employer. This public policy has been expressed in the numerous statutes regulating the payment, assignment, exemption and priority of wages.

Among these statutes we find section 690.11 of the Code of Civil Procedure which exempts wages from garnishment. It is doubtful that an employer with an unliquidated claim for damages against an employee would be permitted to withold wages due the employee where such wages could not be reached by the employer as a judgment creditor.

Furthermore, it is manifest that wages due belong to the employee, and not to the employer. Labor Code section 2860 provides: "Everything which an employee acquires by virtue of his employment, *except the compensation which is due to him from his em-*

ployer, belongs to the employer. . . ." (Emphasis added.)

The public's interest in workers' wages is also manifested by the provisions of section 300 of the Labor Code limiting the assignment of wages. The assignment by the employee of wages to be earned is declared void except as to necessities of life and then only in limited amounts. The statutory prohibition is made inapplicable to deductions for the "payment for goods or services furnished by the employer to the employee or his family at the request of the employee." This specific exclusion from the prohibition against assignment would seem to preclude deductions from wages for other claims such as damages for torts which the employer may have against the employee.

California courts have recognized the public policy in favor of full and prompt payment of wages due an employee. In 1918, the court in upholding the constitutionality of the penalty wage law stated: "Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and, in many cases may make the wage-earner a charge upon the public." (*Moore v. Indian Spring, etc. Mining Co.*, 37 Cal.App. 370, 379-380.)

More recently, this court in an opinion which held the misdemeanor penalty for the wilful failure to pay wages constitutional, observed that "It has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker, and in particular his dependence on wages for the neces-

sities of life for himself and his family, it is essential to public welfare that he receive his pay when it is due. (Citations.) An employer who knows that wages are due, has ability to pay them, and still refuses to pay them, acts against good morals and fair dealing, and necessarily intentionally does an act which prejudices the rights of his employee. Such conduct amounts to a 'case of fraud' within the meaning of the exception to the constitutional prohibition and may be punished by statute.' (*In re Trombley*, 31 Cal.2d 801, 805-810.)

Still another expression of this state's concern for the workers who form such a large part of our population is found in *People v. Vanderscc*, 139 Cal.App. 2d 388, 390-391, wherein the court said: "And legislation which is enacted with the object of promoting the welfare of large classes of workers whose personal services constitute their means of livelihood must certainly be regarded as of direct and vital concern to every community and as calculated to confer direct or indirect benefits upon the people as a whole, thereby coming within the proper exercise of the police power, seeking as it does to promote the welfare of a large class against a real and existing danger. . . .

". . . The prospective employer and the applicant for employment, who is usually dependent on his own earnings for the support of himself and his family, do not deal on an equal footing.' "

In *Reid v. Overland Machined Products*, 55 Cal.2d 203, this court held the Labor Code requirement that an employer unconditionally pay wages concededly due had the effect of rendering void an attempted

accord and satisfaction as to a disputed balance yet outstanding. We stated at page 208 that: "Section 206 is designed to secure to the wage earner prompt payment of all wages concededly due and it expressly precludes an employer's coercing a settlement of disputed claims by offering conditional payment."

In the case at bar, the parties stipulated that the deductions from the wages of plaintiff's employees are taken for shortages "not caused by a dishonest or wilful act or by the culpable negligence of the employee." Deductions may be made, therefore, for losses beyond the employees' control, as well as for losses due to simple negligence. The employees, through this device, are in effect made insurers of the employer's merchandise, and the commissions earned by the employees which are subject to the deduction serve the same purpose as an employee's "bond" exacted by the employer to cover shortages.

Labor Code sections 400 through 410 set out in detail the employee's bond law, and the manner in which a cash bond may be exacted from an employee to cover merchandise entrusted to him.[1] It provides a criminal penalty for the violation of its provisions. (Labor Code § 408.) These deductions from wages due appear to be in contravention of the spirit, if not the letter, of the employee's bond law. "'Where a stat[illegible]

[1]Labor Code § 402. No employer shall demand, exact, or accept any cash bond from any employee or applicant unless:

(a) The employee or applicant is entrusted with property of an equivalent value, or

(b) The employer advances regularly to the employee goods, wares or merchandise to be delivered or sold by the employee, and for which the employer is reimbursed by the employee at regular periodic intervals, and the employer limits the cash bond to an

prohibits or attaches a penalty to the doing of an act, the act is void even though the statute does not expressly pronounce it so. . . . The imposition by statute of a penalty implies a prohibition of the act referred to and a contract founded upon such act is void." (Citations.)" (*Reid v. Overland Machined Products*, supra, 55 Cal.2d 203, 208.) Manifestly, the Industrial Welfare Commission was intended to have authority under section 1182, subdivision (c) to prohibit a practice intended to accomplish the same purpose as one expressly proscribed by statute.

Furthermore, the clerical or accounting feature of the employment relation, of which this system of deductions is a part, is certainly a condition of employment which the commission has the right to regulate. The use of the device of deductions creates the danger that the employer, because of his superior position, may defraud or coerce the employee by deducting improper amounts. While it is conceded in the case at bar that plaintiff herein practiced no fraud or deceit upon his employees, nevertheless, it was the utilization of secret deductions or "kick-backs" to make it appear that an employer paid the wage provided by a collective bargaining contract or by a statute, although in fact he paid less, that led to the enactment of Labor

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amount sufficient to cover the value of the goods, wares, or merchandise so advanced during the period prior to the payment therefor.

Labor Code § 403. If cash is received as a bond it shall be deposited in a savings account in a bank authorized to do business in this State, and may be withdrawn only upon the joint signatures of the employer and the employee or applicant.

Cash put up as a bond shall be accompanied by an agreement in writing made by the employer and employee or applicant, setting forth the conditions under which the bond is given.

Code sections 221-223 in 1937. These sections, this court said in *Sublett v. Henry's etc. Lunch,* 21 Cal.2d 273, 274, "are declarative of an underlying policy in the law which is opposed to fraud and deceit." In *Shalz v. Union School District,* 58 Cal.App.2d 599, the court held that deductions by the employer from stipulated wages for payment of exorbitant amounts for lodging and transportation were in reality nothing more than devices to reduce the wage scale.

A further reason for legislative disapproval of deductions exists in the reliance of the employee on receiving his expected wage, whether it be computed upon the basis of a set minimum, a piece rate, or a commission. To subject that compensation to unanticipated or undetermined deductions is to impose a special hardship on the employee.

Plaintiff contends, however, that the effect of section 8 of the instant order is unfair to the employer since the prohibition of deductions for cash shortages places the burden of these losses upon the employer. But some cash shortages, breakage and loss of equipment are inevitable in almost any business operation. It does not seem unjust to require the employer to bear such losses as expenses of management when it is presently the unchallenged practice to require him to bear, as a business expense, the cost of tools and equipment, protective garments and uniforms furnished to the employee by prohibiting deductions for these costs.

Furthermore, the employer may, and usually does, either pass these costs on to the consumer in the form

of higher prices or lower his employees' wages proportionately, thus distributing the losses among a wide group. In addition, the employer is free to discharge any employee whose carelessness causes the losses, and he is not prohibited from deducting for cash shortages caused by the "dishonest or wilful act, or by the culpable negligence of the employee."

California is not alone in its position that cash shortages should be borne as an expense of management. Hawaii, Wisconsin, New York, Oregon, Pennsylvania, and Washington have similar statutes and orders.[2]

While it is fundamental in our law that an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or act beyond the powers given to it by the statute which is the source of its power, however, " 'the authority of an administrative board or officer . . . to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned. This authority is implied from the power granted.' [Citations.]" *(Cal. Drive-in Restaurant Assn. v. Clark*, 22 Cal.2d 287, 303.)

From the foregoing it is obvious that both the Legislature and our courts have accorded to wages

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[2]Rev. Laws of Hawaii, 1955 ch. 95A, as amended by Act 137, L. 1957; Wis. Stats., ch. 103.455; McKinney's Consolidated Laws of New York, Book 30, Labor Law, § 656; Oregon Revised Statutes § 653.110, Wage and Hour Commission Order No. 14; Purdon's Penna. Statutes Annotated, Title 43 § 331a, General Interpretative Bulletin No. 1, Applicable to All Minimum Wage Orders; Washington Revised Code, Title 49 §§ 49.46.002 to 49.46.910, I.W.C. Order No. 46.

special considerations other than merely fixing minimums, and that the purpose in doing so is based on the welfare of the wage earner. As demonstrated, the regulation in the instant case affected conditions of employment, and the commission might well fix such "standard conditions of labor demanded by the health and welfare of" women and minors. We are aided in this conclusion by the presumption that regulations of the welfare Commission are "reasonable and lawful" (Lab. Code, § 1200), and the recent opinions of this court upholding the regulations of administrative agencies for which there is no express statutory or constitutional authority. (*Hough v. McCarthy*, 54 Cal.2d 273; *Sauer v. McCarthy*, 54 Cal.2d 295; *Allied Properties v. Dept. of Alcoholic Beverage Control*, 53 Cal.2d 141.)

We hold, therefore, that the Legislature did not intend that subsections (a), (b), and (c) of section 1182 be mutually exclusive in the instant application thereof, but that the commission is authorized to regulate a condition of labor affecting wages above the minimum and that deductions for cash shortages is properly characterized as a condition of employment.

For the foregoing reasons the judgment is reversed and the cause remanded with directions to the court below to enter judgment for defendants.

White, J.

We concur:

Gibson, C. J.

Traynor, J.

Peters, J.

Dooling, J.

CONCURRING OPINION BY SCHAUER, J.
TO OPINION BY WHITE, J.

I concur in the judgment and, in general, in much of the opinion authored by Mr. Justice White. As a precaution, however, against the drawing of unwarranted inferences from the opinion I state more fully my reasons for concurrence.

The subject order of the Industrial Welfare Commission prohibits wage deductions for cash shortage "unless it can be shown that the shortage . . . is caused by a dishonest or wilful act or by the culpable negligence of the employee." It prohibits, in other words, deductions for shortages either (1) caused by negligence of the employe other than "culpable negligence" (whatever that may mean), or (2) occurring without any negligence whatever on the part of the employe.

On the record before us it is unnecessary to explore the meaning in this context of the criminal law term "culpable negligence" (see e.g., Pen. Code, § 26 (subd. Six); *People v. Sidwell* (1915) 29 Cal.App. 12, 18-19), or to consider whether the commission has statutory authority to prohibit deductions caused by negligence of the employe other than "culpable negligence." After three days of hearings on plaintiff-employer's appeal from the initial determination of violation of Order No. 5-57, the Division of Industrial Welfare made findings of fact concerning plaintiff's method of operation which are here set out in the margin.[1] From

[1]In addition to the facts summarized in the opinion of Justice White (ditto, p. 2) the following findings were made:

these findings the Division of Industrial Welfare concluded "that employees working under such conditions cannot be held to be guilty of *culpable* negligence, or any negligence. Indeed, the greatest diligence could still result in an overage or a shortage. Discrepancies are bound to occur due to the *system*, rather than the individual."

"2. Inventory is supposed to be taken at the conclusion of the day's run and the additional items loaded in the morning added to this. Between the time of night inventory and morning additions, the driver is not in control of the truck. It is open, standing in the yard. Some of the items are buried in ice and not visible. Small items, such as candy, may be jumbled together.

"3. Each route driver is supposed to inventory her truck prior to starting on her route. Fifteen minutes is the time allotted to inventory, load and prepare the truck for the road.

"4. Every truck driver on each route has a definite time that she is to be at each establishment on her route.

"5. An analysis of the beginning and ending times for each route showed that some routes have as little as five or ten minutes to prepare trucks.

"6. Starting time for drivers is staggered, but the major portion of the drivers report to work between 7:00 and 7:15 a.m.

"7. Route drivers have full charge of their trucks while on the route. However, two sides are open simultaneously at each stop allowing ample opportunity for pilferage. At the completion of the work day employees are required to lock their trucks and turn the key in to the office. Trucks are loaded by other personnel following the completion of the day's run and prior to the start of the next day's run. During the loading period, employees' trucks are open and accessible to others.

"8. Shortages may be caused by 'paper errors,' by failure to take inventory, or by pilferage on the part of the customers.

"9. Route drivers have no knowledge as to whether they are over or short at the time that their cash is turned in. A list of overages and shortages is normally posted the day following the cash turn in.

"10. An analysis of overages and shortages on each route indicates a pattern of error. On each day almost every driver has an over or a short.

"11. Overages and shortages are assigned to a route regardless of the number of drivers who handle that route."

These administrative findings "are, in the absence of fraud, conclusive" (Lab. Code, § 1187), and are not challenged in the present proceeding. In the light of the history of past abuses reflected in the enactment of the various regulatory provisions of part 1, division II of the Labor Code (e.g., §§ 201, 209, 221, 222.5, and 401), the commission could properly conclude that deductions for shortages occurring without any fault on the part of the employes and hence unrelated to their performance are disruptive of good employer-employe relations and tend to impose a special hardship upon the individual employe, who normally relies on payment in full of his or her anticipated wages. To this extent the commission could properly determine that such deductions are detrimental to "The standard conditions of labor demanded by the health and welfare of the women" employed in plaintiff's business (Lab. Code, § 1182, subd. (c)), and accordingly issue the subject order of compliance.

Our decision, however (as I understand the intention of its author), should not be construed by the commission as authorizing it to regulate *any* term of an employment contract on the theory that a "condition of labor" is thereby affected.

No such all-encompassing delegation of power was intended by the Legislature in enacting section 1182 of the Labor Code. The commission does not have authority to fix "conditions of labor" *in general* any more than it has authority to fix minimum wages or maximum hours without regard to the statutory criteria (Lab. Code, § 1182, subds. (a) and (b)). By

subdivision (c) of section 1182 the commission's authority in this respect is expressly restricted to fixing those "standard" conditions of labor which are "demanded by the health and welfare" of women and minors engaged in an occupation in this state.

There can be no doubt that the freedom of all employes to bargain collectively with respect to the terms and conditions of their employment is recognized as basic in our civilization, and that the preservation of that freedom against unjustifiable governmental encroachment is essential to the cause of industrial democracy and hence to the common welfare. By section 923 of the Labor Code "the public policy of this State is declared as follows:

"Negotiations of *terms and conditions of labor* should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable *terms and conditions of employment.* Therefore it is necessary that the individual workman have *full freedom* of association, self-organization, and designation of representatives of his own choosing, *to negotiate the terms and conditions of his employment,* and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other con-

certed activities for the purpose of collective bargaining or other mutual aid or protection." (Italics added.)

Section 923 of the Labor Code is "a general independent declaration of state policy" (*Chavez v. Sargent* (1959) 52 Cal.2d 162, 191 [19]), and represents an application to the area of collective bargaining of the constitutional right of liberty of contract (see *Chavez v. Sargent* (1959), *supra*, 52 Cal.2d at pp. 217-221 [concurring opinion]). That constitutional right is the foundation upon which our free enterprise system has been erected; it must remain free from arbitrary restraints, and may be limited only by reasonable regulations necessary to safeguard the public health and welfare. Absent such necessity, "The Legislature may not limit parties in their power to incorporate in their contracts, otherwise valid, such terms as may be mutually satisfactory to them." (*Ibid.* at p. 217.)

Typical of the "terms and conditions of employment" which may properly be the subject of collective bargaining is the incentive bonus or commission, designed to promote diligence and a high standard of

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[2]Similarly, on the national level Congress has declared in the Labor Management Relations Act of 1947 (29 U.S.C., § 151) that it is "the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of *full freedom* of association, self-organization, and designation of representatives of their own choosing, *for the purpose of negotiating the terms and conditions of their employment* or other mutual aid or protection." (Italics added.)

efficiency on the part of the employe. Such an arrangement between persons of mutual good will must inevitably tend to benefit both. The employer, of course, has the benefit of increased productivity or sales flowing from the employe's efforts; the employe, with little risk and with much to gain, acquires the additional status of entrepreneur, making it possible for him to realize tangible rewards for his diligence and care. In incorporating such a provision in a collective bargaining agreement the parties exercise their constitutional freedom to contract, in a manner consonant with the declared public policy of the state. Our decision today should not be interpreted as encouraging further governmental impairment of that essential freedom.

Schauer, J.

I concur:

McComb, J.

Filed February 19, 1962,
William I. Sullivan, Clerk.

Appendix C

In the Supreme Court of the State of California

In Bank

S. F. No. 20,617

KERR'S CATERING SERVICE,
Plaintiff and Respondent,
vs.
THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA, et al.,
Defendants and Appellants.

MODIFICATION OF OPINION

BY THE COURT

The opinion herein appearing in 57 A.C. at page 352 (Appendix B, page 28) beginning at line 40 is modified by striking the words "Other provisions of existing orders of the commission . . ." and substituting therefor the following: "Other provisions of the order now engaging our attention, namely Order No. 5-57, which regulates only the Public Housekeeping Industry. . . ."

On page 357 (Appendix B, page 34) beginning at line 17 strike out the words "deductions for these

costs" and in lieu thereof insert: "in section 9, subdivisions (a), (b) and (c) of Order 5-57, deductions for these costs."

On page 358 (Appendix B, page 36) at line 26 insert the following after the word "employment": "It necessarily follows that the legislation now before us does no violence to constitutional due process or equal protection of the law."

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 182

KERN'S CASEMENT SERVICE, a corporation,
Petitioner,

vs.

THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA; THE DIVISION OF INDUSTRIAL WELFARE OF THE STATE OF CALIFORNIA; JESSE F. HENNING, Director of the Department of Industrial Relations of the State of California; FLORENCE G. CLIFTON, Chief of the Division of Industrial Welfare of the State of California; JOHN W. QUINNEY, VIRGINIA ALLEN, DANIEL E. KOSHLAND, FRANCES LARNER, and MAE BROSSEAU, in their capacity as The Industrial Welfare Commission of the State of California,
Respondents.

Answer to Petition for a Writ of Certiorari to the Supreme Court of the State of California

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No.....

KERR'S CATERING SERVICE, a corporation,
Petitioner,

vs.

THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA; THE DIVISION OF INDUSTRIAL WELFARE OF THE STATE OF CALIFORNIA; JOHN F. HENNING, Director of the Department of Industrial Relations of the State of California; FLORENCE G. CLIFTON, Chief of the Division of Industrial Welfare of the State of California; JOHN W. QUIMBY, VIRGINIA ALLEE, DANIEL E. KOSHLAND, FRANCES LARSEN, and MAE STONEMAN, in their capacity as The Industrial Welfare Commission of the State of California,
Respondents.

Answer to Petition for a Writ of Certiorari to the Supreme Court of the State of California

PRELIMINARY STATEMENT

The petitioner herein seeks a writ of certiorari from this learned court to review a decision of the Supreme

Court of the State of California upholding the validity of an administrative order enacted by the Industrial Welfare Commission of the Department of Industrial Relations of the State of California.

Petitioner contends that the order, which prohibits an employer of women and minors from deducting from the wage of said women and minors for any cash shortages not caused by the dishonest or willful act or by culpable negligence of the female or minor employee, is unconstitutional in the following three respects:

(1) It deprives said employer of property without due process of the law insofar as it deprives the employer of the right to contract by means of collective bargaining to deduct shortages from a negligent employee's wages over and above a minimum wage provided by state law.

(2) It deprives said employer of equal protection of the law insofar as it deprives the employer of the right to contract by means of collective bargaining to deduct shortages from a negligent employee's wages over and above a minimum wage provided by state law.

(3) It is an unconstitutional delegation of legislative power to the executive insofar as it deprives the employer of the right to contract to deduct shortages from a negligent employee's wages so long as said deductions do not invade the minimum wage provided by law.

STATEMENT OF THE FACTS

Plaintiff is in the business of industrial catering (CT 2). This consists of maintaining a fleet of trucks which are sent out daily on regular routes to various business and industrial establishments in the East Bay area (CT 35). The employees of these various plants purchase coffee, doughnuts, sandwiches, etc., from the trucks (CT 35). Plaintiff

employs a number of women as driver-salesgirls on these trucks (CT 35).

Plaintiff's driver-salesgirls are paid according to a formula pursuant to a collective bargaining agreement (CT 19). They receive as base pay $45 to $60 a week, depending on their length of service (CT 19). Plaintiff alleged (CT 3), and it was admitted (CT 7), that this base pay exceeds the minimum wage specified in section 4 of the order (CT 14, sec. 4). In addition, after three months employment, the driver-salesgirls receive a 15% commission on all sales made on regular routes over a quota figure of $475.00 per week (CT 20).

This "commission", however, is subject to reduction depending upon the amount of "cash shortage" which has accrued to that route during the month (CT 20). The shortages are computed in the following manner: Before leaving on her route the driver-salesgirl is required to inventory the goods on her truck, and she receives a small amount of cash for change purposes (CT 35-36). At the completion of the day's work she again is required to inventory her truck and turn in her cash (CT 35). The total of the cash and the retail value of the merchandise at the end of the day should, in theory, equal the value at the beginning of the day. In practice it does not (CT 26-34), and the extent of difference is the amount of the overage or shortage. These overages and shortages are totaled monthly and, if there is a net shortage for a particular route, it is subtracted from the "commissions" earned by the driver-salesgirls working that route (CT 35).

It is this deduction for shortages which is the subject of this lawsuit. The plaintiff's method of operation came to the attention of agents of the Division of Industrial Welfare in the spring of 1959 (CT 35). They informed the plaintiff that the deduction was unlawful under section 8

of Order No. 5-57 of the Industrial Welfare Commission (CT 35) which provides:

> "No employer shall make any deduction from the wage of an employee for any cash shortage, breakage, or loss of equipment, notwithstanding any contract to the contrary, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or wilful act, or by the culpable negligence of the employee."[1]

The plaintiff sought an appeal from this determination on the ground that the shortages were caused by the "culpable negligence" of the driver-salesgirls (CT 35). The matter was heard several times before an area supervisor who, in due course, found against the plaintiff and so informed plaintiff by letter on December 15, 1959 (CT 35). It was stipulated at the time of hearing this case that the plaintiff did not seek by this action to review the agency's decision that the plaintiff's employees were not "culpably negligent" (RT 3).

On April 6, 1960, the plaintiff filed a complaint in declaratory relief alleging the existence of a dispute between the plaintiff and the Division of Industrial Welfare as to the validity of section 8 of Order No. 5-57 (CT 1). Plaintiff contended section 8 of the order was unlawful in several respects, notably, that it was beyond the powers of the agency to promulgate and that it violated plaintiff's liberty of contract. After filing an answer admitting the factual allegations of the complaint (CT 6), the defendants filed a motion for summary judgment with supporting affidavits (CT 15-50). Plaintiff resisted this motion, but not on the ground of any factual dispute (RT 4) and, in due course, filed a cross-motion for summary judgment (CT 69).

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1. The full order is in the record in this case (CT 14). Orders of the Industrial Welfare Commission appear in the Administrative Code. Order 5-57 appears at 8 Cal. Admin. Code sec. 11380.

The court, by minute order, granted the plaintiff's motion for summary judgment (CT 73). The basis of the court's ruling is not entirely clear from the minute order but it appears to rest chiefly on the ground that the Industrial Welfare Commission exceeded its powers insofar as its order prohibits deductions from wages which exceed the minimum wage specified in the order. It is also suggested that the order is unconstitutional, although the precise basis for that ruling is not made explicit in the minute order.

In a two to one decision, the District Court of Appeal held that the Division of Industrial Welfare did not have the power to promulgate section 8 of Order No. 5-57. Constitutional questions were not discussed. (Petition, Appendix A.) The Division of Industrial Welfare petitioned the California Supreme Court for a hearing, which was granted, and on February 19, 1962, the California Supreme Court unanimously reversed the lower courts and held the Industrial Welfare Commission had the power to promulgate section 8. Constitutional issues were not discussed. (Petition, Appendix B.) Petitioner timely filed a petition for rehearing, which was denied on March 21, 1962, but at that time the opinion was modified to hold "that the legislation now before us does no violence to constitutional due process or equal protection of the law." (Petition, Appendix C, page 44.)

ARGUMENT

I. There Is No Conflict in the Decisions of the Highest Courts of the Various States Sufficient to Justify the Granting of the Instant Writ.

As a basic reason for granting the instant writ, petitioner asserts that the instant decision by the California Supreme

Court conflicts with the decision of the highest courts of other states upon constitutional issues and that uniformity of decision is needed to guide legislators, administrators and collective bargainors in all the states.

Contrary to petitioner's assertion, respondent can find no direct conflict among the various states on the precise issues presented herein. In none of the cases cited is there any reference to invalidity of administrative orders or regulations of the type here involved on the grounds of a denial of equal protection of the law or an unconstitutional delegation of legislative power to the executive. So far as we are aware, there have been very few cases involving regulations of this precise type. The Wisconsin statute has twice been sustained (*Zarnott v. Timken Detroit Axle Co.*, 244 Wis. 596, 13 N.W.2d 53 (1944) and *Peters v. International Harvester Co.*, 248 Wis. 451, 22 N.W.2d 518 (1946).

Whatever "conflict" exists comes but from one case cited by petitioner, that of *Commonwealth v. Perry*, an 1891 case in 155 Mass. 117, 28 N.E. 1126, which invalidated a Massachusetts statute prohibiting mill operators from taking deductions from imperfections in weaving. Admittedly, the 1891 *Perry* case and the instant opinion appear to conflict in theory concerning the extent to which liberty of contract may be abridged. But as will be demonstrated, *infra*, liberty of contract is now well established to be a relative rather than an absolute right. The 1891 Massachusetts court and the present California Supreme Court may well have disagreed on the extent to which liberty of contract may be abridged in the interests of the common good. Certainly at this time, however, certiorari is not needed to resolve this "conflict". It no longer exists in light of the later authorities which have consistently upheld abridgments of liberty of contract similar to that which exists by virtue of the order

in question. It is submitted that the majority decision in the *Perry* case is entirely at odds with the later cases and that Justice Holmes' dissent in that case is much more in line with the modern approach. Justice Holmes said:

> "The prohibition, if any, must be found in the words of the constitution, either express or implied, upon a fair and historical construction. What words of the United States or state constitution are relied upon? The statute cannot be said to impair the obligation of contracts made after it went into effect: [citation] So far as has been pointed out to me, I do not see that it interferes with the right of acquiring, possessing, and protecting property, any more than the laws against usury or gaming. In truth, I do not think that that clause of the bill of rights has any application. It might be urged, perhaps, that the power to make reasonable laws impliedly prohibits the making of unreasonable ones, and that this law is unreasonable. If I assume that this construction of the constitution is correct, and that, speaking as a political economist, I should agree in condemning the law, still I should not be willing or think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so."

We submit that Justice Holmes was correct. The concept of liberty of contract as a part of the due process clause has been rejected (*Lincoln Union v. North Western Co.*, 335 U.S. 525, 534-37). The question is not whether some statute or regulation must yield to this essentially meaningless absolute but rather whether the particular rule or regulation has any rational relationship to a legitimate object of government (*Redevelopment Agency v. Hayes*, 122 C.A.2d 777, 806, 266 P.2d 105). The protection of the welfare of working women—the establishment of fair working

conditions—clearly is a legitimate object of governmental concern (*Lincoln Union, supra; Cal. Drive-In Restaurant Association v. Clark*, 22 Cal.2d 287, 140 P.2d 657). That the order in question bears a rational and reasonable relationship to its legitimate public end will be demonstrated in the argument immediately following. Thus, it is submitted there is no conflict in the later authorities compelling the issuance of the instant writ.

II. The Instant Decision Upholding the Administrative Order in Question Does Not Deprive the Employer Herein of Due Process of the Law.

Petitioner admits that the liberty and property are not absolute concepts but that the state may abridge them for the common good (Petition, page 12). Petitioner acknowledges that the controlling principle in this case is whether the police power of the state has been used to accomplish a legitimate end in a reasonable way (Petition, page 12). Petitioner contends, however, that the instant decision erodes this principle. Petitioner thus is of the opinion that the instant order does not reasonably serve a recognized legitimate end. Petitioner is thus merely disagreeing with the conclusions of a responsible agency of the State of California and the highest court of that state.

The essence of petitioner's due process argument is simply whether due process requires that he should be allowed to collectively bargain away a safeguard deemed necessary by the State of California in the interests of protecting the health and welfare of women and minor employees in the State of California.

As demonstrated above, the test of whether one's liberty or property may be taken by the State in the interest of the common good is whether such taking is in furtherance of a

legitimate public need accomplished in a reasonable way. Unquestionably, the protection of women and minor employees has been deemed to be a legitimate end pursuant to the exercise of state police power (*West Coast Hotel Co. v. Parrish*, 300 U.S. 379). The only question remaining is whether the order here is an admissible or reasonable means to that end. More precisely, the question is whether the public body enacting the order could reasonably so conclude that the order serves the end. It is well settled that a court will not substitute its judgment for that of the enacting body but rather will concern itself only with the question could that public body reasonably conclude that the order enacted serves a legitimate public end (*Bess v. Park*, 144 Cal. App. 2d 798, 804, 301 P.2d 978 (1956), see also *Cal. Drive-In Restaurant Association v. Clark*, 22 Cal. 2d, 287, 297, 140 P.2d 657 (1943)).

A responsible public agency has deemed the order in question to be a necessary safeguard to the protection of women and minor employees. Its orders to this end are presumably valid (Labor Code section 1200). The highest court in the State of California has decided that the means enacted are reasonable and consistent with the end pursued.

Petitioner, however, disagrees. Petitioner asserts that the means used (admittedly enacted to serve a legitimate public end) are unreasonable and not in service of that end in that the order:

(1) Bears no relation to the legitimate end it is trying to reach;

(2) Is unnecessary in view of the powerful bargaining position of labor unions which protect the interests of women and minor employees;

(3) Deprives an employer of the right to protect himself from the negligence of his employees; and

(4) Deprives the employer of his "day in court".

The difficulty with petitioner's argument that the order in question bears no relation to the end sought is that petitioner miscomprehends the end pursued. On page 13 of his petition, petitioner infers that the order bears no relation to a minimum or living wage and thus is unreasonable. If the enactment of a minimum wage was the only end to be served, then indeed the order here might be unreasonable. But the order was not enacted to protect the minimum wage but rather was enacted and held by the California court to be properly enacted as affecting standard conditions of labor demanded by the health and welfare of women and minor employees.

In this regard the California Supreme Court stated:

> "Furthermore, the clerical or accounting feature of the employment relation, of which this system of deductions is a part, is certainly a condition of employment which the commission has the right to regulate. The use of the device of deductions creates the danger that the employer, because of his superior position, may defraud or coerce the employee by deducting improper amounts. While it is conceded in the case at bar that plaintiff herein practiced no fraud or deceit upon his employees, nevertheless, it was the utilization of secret deductions or 'kick-backs' to make it appear that an employer paid the wage provided by a collective bargaining contract or by a statute; although in fact he paid less, that led to the enactment of Labor Code sections 221-223 in 1937. These sections, this court said in Sublett v. Henry's etc. Lunch, 21 Cal.2d 273, 274, 'are declarative of an underlying policy in the law which is opposed to fraud and deceit.' In Shalz v. Union School District, 58 Cal. App. 2d 599, the court held that deductions by the employer from stipulated wages for payment of exorbitant amounts for lodging and transportation were in reality nothing more than devices to reduce the wage scale.

"A further reason for legislative disapproval of deductions exists in the reliance of the employee on receiving his expected wage, whether it be computed upon the basis of a set minimum, a piece rate, or a commission. To subject that compensation to unanticipated or undetermined deductions is to impose a special hardship on the employee.

"Plaintiff contends, however, that the effect of section 8 of the instant order is unfair to the employer since the prohibition of deductions for cash shortages places the burden of these losses upon the employer. But some cash shortages, breakage and loss of equipment are inevitable in almost any business operation. It does not seem unjust to require the employer to bear such losses as expenses of management when it is presently the unchallenged practice to require him to bear, as a business expense, the cost of tools and equipment, protective garments and uniforms furnished to the employee by prohibiting in section 9, subdivisions (a), (b) and (c) of Order 5-57, deductions for these costs.

"Furthermore, the employer may, and usually does, either pass these costs on to the consumer in the form of higher prices or lower his employees' wages proportionately, thus distributing the losses among a wide group. In addition, the employer is free to discharge any employee whose carelessness causes the losses, and he is not prohibited from deducting for cash shortages caused by 'he 'dishonest or wilful act, or by the culpable negligence of the employee.'

"California is not alone in its position that cash shortages should be borne as an expense of management. Hawaii, Wisconsin, New York, Oregon, Pennsylvania, and Washington have similar statutes and orders." (pp. 33-35 Pet. Appendix B)

"We hold therefore .... that deductions for cash shortages is properly characterized as a condition of employment." (p. 36, Pet. Appendix B)

Thus, the California Industrial Welfare Commission and the legislative and administrative bodies of the above-mentioned states have considered the order to be in furtherance of protecting the standard working conditions necessary to the health and welfare of women and minor employees. Petitioner, as is his right, disagrees with this opinion. His disagreement, of course, is of no moment unless as a matter of law we conclude that the opinion of so many responsible bodies is arbitrary, capricious and unreasonable. For the reasons summarized above by the California Supreme Court, it is obvious that while an honest difference of opinion is possible concerning the necessity of the order in question, a decision that it is necessary is certainly not arbitrary, capricious and unreasonable.

Petitioner also argues that the order is unnecessary in view of the existence of powerful labor unions who can bargain collectively concerning the prohibitions of the order in question and "concede them in the interest of the majority of its industrious and honest employers". Suffice to say that if this argument is carried to its logical end, all state requirements in the interest of the health and welfare of women and minor employees are unnecessary. As much as labor unions have helped to raise the standards of working conditions for women and minor employees in the State of California, the California Legislature has not yet seen fit to entrust the protection of women and minor employees solely to labor unions through the collective bargaining process. The order in question has been determined necessary to the health and welfare of women employees everywhere in the State of California. It is, of course, no answer to state that powerful unions consider the necessity of the prohibition in question. They may or may not exact it from employers during their negotiations. Their consideration of the prin-

ciple is, of course, not enough. Here the considered working condition was not exacted but was bargained away.

Petitioner next argues that the order in question deprives him of the right to protect himself against the ordinary negligence of his female and minor employees and that he is deprived of his "day in court" and that this is certainly the taking of property without due process of the law.

Petitioner paints an untrue picture of his "plight". All that the order in question forbids is a deduction from the wages of the employees for cash shortages caused by the simple negligence of the employee or by acts beyond her control. If the shortage is due to the willful act or culpable negligence of the employer, a deduction from the wage of the employee is permissible. If the shortage is the result of ordinary negligence, the employer may sue the employee or discharge her. In any event, he may pass the cost of these losses on to the consumer in the form of higher prices or lower his employee's wages proportionately. Thus, the employer notwithstanding the prohibitions of the order in question may still protect himself from the ordinary negligence of his female employees and may have his day in court. His property in no sense has been taken without due process of the law. All that has been taken is some of his complete and unrestricted liberty of contract in the interest of a recognized common good and such the law allows.

III. The Instant Decision Upholding the Administrative order in Question Does Not Deprive the Employer Herein of Equal Protection of the Law.

In its argument concerning equal protection of the law (briefed for the first time in the instant petition), petitioner seems to assert that somehow the guarantee of equal protection of the law is violated by the order in question in that

employees and male employees are not afforded the same rights given female and minor employees. Suffice to say no cases are cited to support this contention on the part of the employer. It is submitted that it is entirely without merit. Of course the order only pertains to women and minors. Their protection has been determined to be a legitimate end of the police power. The aim of the order is solely to protect them. If the specialized protection afforded them must meet the standard of equal protection of the laws in relation to their employers and male counterparts, then all laws enacted to protect women and minors must fail. This is, of course, not the law and the principle of equal protection of the law has no application here.

IV. The Order in Question Is Not the Result of an Unconstitutional Delegation of Legislative Power to the Executive.

Petitioner is in error in asserting this contention in the instant petition as it presents no federal question. It is well settled that the question of unlawful delegation of state legislative power is determined only in terms of the state constitution and the Federal Constitution plays no part therein (*Highland Farms Dairy v. Agnew*, 300 U.S. 608, 57 Supreme Ct. 549, 81 Lawyers Ed. 835; *Sandstrom v. California Horse Racing Award*, 31 Cal.2d 401, 189 P.2d 17).

Moreover, even under the California Constitution, petitioner's argument concerning an unconstitutional delegation of legislative power (again briefed for the first time in the instant petition) is once more based upon a faulty conception of the powers given the Industrial Welfare Commission of the State of California by the legislature of that state and the purpose to be served by the order. Petitioner argues:

> "The power to fix the standard conditions of labor now is administratively extended, and judicially blessed, to invade the field of wages only. Why, then, did the Legislature enact 1182(a) and 1182(b) of the California Labor Code? Is there not here delegated power which 'is not canalized within banks that keep it from overflowing'; in this case Section 1182(c) of the California Labor Code 'is a roving commission to inquire into evils and upon discovery correct them'. Schechter Corp. v. U.S. (1935), 295 U.S. 495, 557."

It is at once apparent that petitioner is not really arguing unconstitutional delegation of power but rather that the Industrial Welfare Commission exceeded the powers given it. The California Supreme Court did not decide that the Industrial Welfare Commission could rove into any area of evil and upon discovery attempt to correct that evil. The California Supreme Court decided only that the order in question could reasonably be determined to affect the standard conditions of labor necessary to the health and welfare of women and minor employees.

The legislature did limit the power of the Industrial Welfare Commission to enact orders and regulations. Its power was limited to enacting orders and regulations fixing a minimum wage, maximum hours of employment and standard conditions of labor demanded by the health and welfare of female and minor employees (Labor Code section 1182). Thus, the powers of the Industrial Welfare Commission were not roving in nature but well canalized and defined.

The California Supreme Court in the instant opinion has decided that the order in question is properly enacted as affecting standard working conditions. Petitioner merely disagrees with this decision. Petitioner begrudgingly accepts the fact that the California Supreme Court decides

the question of the extent of power granted by the Legislature to the Industrial Welfare Commission (a decision contrary to its own opinion) but then attempts to turn its own disagreement into an improperly raised federal issue of unconstitutional delegation of power. Contrary to the assertions by petitioner, the instant opinion does not hold that anything bearing on wages or hours may be characterized as a standard condition of labor and therefore subject to regulation by the Industrial Welfare Commission. The California Supreme Court went to great lengths to justify the use of the power given the Industrial Welfare Commission in respect to the order in question. Considerable discussion was devoted to the question of whether the instant regulation could be properly characterized as affecting the standard condition of labor. If in regard to the question of a proper exercise of the power granted, a relationship to the field of wages was all that was necessary, the opinion would have been short indeed. The opinion stands simply for the proposition that only those regulations and orders which establish a minimum wage, maximum hours of employment or fix standard conditions of labor demanded by the health and welfare of female and minor employees are within the power granted the Industrial Welfare Commission. Specifically, the opinion holds that the instant regulation falls within that power as affecting a standard condition of labor. Thus, the opinion does not justify nor "judicially bless" an unconstitutional delegation of legislative power to the executive nor endanger the American public from losing their right to have their elected legislators enact and repeal laws.

CONCLUSION

The state of the law concerning the issues herein is not uncertain or conflicting and therefore there is no need for certiorari to be granted herein. The order in question is a proper exercise of the police power to fix standard conditions of labor. It has been determined to be within the statutory powers of the Industrial Welfare Commission and bears a rational relationship to protecting the welfare of working women and minor employees. As such, it does not violate any constitutional limitations.

WHEREFORE, it is respectfully prayed that the instant petition for a writ of certiorari be denied.

Respectfully submitted,

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